Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates:	YES/**NO**

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO: M255/21

In the matter between:

M[redacted] J[redacted] D[redacted]	**APPLICANT**

And

G[redacted] V[redacted] L[redacted] D[redacted] CC	**1ST RESPONDENT**
J[redacted] A[redacted] C[redacted] D[redacted]	**2ND RESPONDENT**

AND

APPLICATION NO: M256/21

In the application between:

M[redacted] J[redacted] D[redacted]	**1ST APPLICANT**
ANTONIE CHRISTOFFEL VAN DYK	**2ND APPLICANT**
MARIA MAGDALENA VAN DYK	**3RD APPLICANT**

And

J[redacted] E[redacted] CC **1ST RESPONDENT**

J[redacted] A[redacted] C[redacted] D[redacted] **2ND RESPONDENT**

JUDGMENT

REDDY J

Introduction

[1] The litigation between Mr. J[redacted] A[redacted] C[redacted] D[redacted], ("Mr. D[redacted]") and Mrs. M[redacted] J[redacted] D[redacted], ("Mrs. D[redacted]") has been traipsing through the corridors of this Court for a prolonged period. This litigation includes a divorce action. Mr. D[redacted] and Mrs. D[redacted] each hold fifty percent (50%) of the members interest in J[redacted] E[redacted] CC and G[redacted] V[redacted] L[redacted] D[redacted] CC. Mrs. D[redacted] together with her co-applicants were successful in securing provisional orders for the liquidation of both close corporations and moved for final liquidations orders of same.

[2] Mr. D[redacted] starved off these respective final winding up orders and conditionally moved a counter application as evinced by section 36 of the Close Corporation Act, 69 of 1984 ("the CCA"). As can be seen from the respective citations of Mr. and Mrs. D[redacted], it was agreed between the parties that the legal principles on both were germane

to both applications. Resultantly the applications **UM 255/2021** and **UM 256/2021** were always considered conjunctively.

[3] Afore several hearings of these combined applications and with the *consensus* of the Advocate Fourie SC, for Mrs. D[redacted] and Advocate Pistor SC, for Mr. D[redacted] the following order was handed down on 01 December 2023:

Case M255/21

The application for the liquidation of the Close Corporation 'G[redacted] V[redacted] L[redacted] D[redacted] CC' is dismissed with costs.

Case M256/21

The application for the liquidation of the Close Corporation 'J[redacted] E[redacted] CC' is dismissed with costs.

No order was made on the conditional counterclaim filed by Mr. D[redacted] in terms of section 36 of the Close Corporation Act, 69 of 1984.

[4] As further agreed with the respective Counsel, the order would be handed down and any request for reasons would follow. To this end, a Notice in terms of Rule 49(1)(c) of the Uniform Rules of Court, ("the Rules"), was filed on 31 January 2024. It was placed before me on 01 February 2024. My response to the request is what follows.

[5] After hearing oral argument on 13 March 2023, the following order was handed down:

Case Number M255/21

It is ordered:

1. The applicant's attorney of record is directed to prepare and deliver a complete consolidated affidavit in terms of section 346(4A) (a) and section 346A of the Companies Act, 61 of 1973 relating to service of the application and any subsequent orders granted, together with proof of service, including the relevant original Sheriff's returns of service, where applicable, by no later than 23 August 2023.

2. Reasons for the order made in terms of paragraph 1 will be provided on 7 August 2023.

3. In relation to the order made in terms of paragraph 1 the applicant is to pay the costs.

4. The rule *nisi* is extended to 23 August 2023.

Case Number M256/21

It is ordered:

5. That the rule *nisi* issued by the Honourable Mr. Justice Petersen on 22 October 2021, and thereafter extended by the Honourable Mr. Justice Hendricks on 25 November 2021, and again extended by Mr. Justice Hendricks on 11 March 2022 to 8 September 2022, is hereby revived.

6. The rule *nisi* so revived need not be served again.

7. The order granted by the Honourable Mr. Justice Hendricks on 25 November 2021, extending the rule *nisi* to 11 March 2022, is amended to reflect the registration number of the first respondent, J[redacted] E[redacted] BK, to read "**2006/035920/23**".

8. In relation to the orders made in terms of paragraphs 1, 2 and 3, no order is made as to costs.

9. The applicant's attorney of record is directed to prepare and deliver a complete consolidated affidavit in terms of section 346(4A) (a) and section 346A of the Companies Act, 61 of 1973 relating to service of the application and any subsequent orders granted, together with proof of service, including the relevant original Sheriff's returns of service, where applicable, by no later than 23 August 2023.

10. Reasons for the order made in terms of paragraph 5 will be provided on 7 August *2023*.

11. In relation to the order made in terms of paragraph 5, the applicant is to pay the costs.

12. The rule *nisi* is extended to 23 August 2023.

[5] On the return date, the rule *nisi* was ambiguously interpreted, which after oral argument necessitated a further extension of the rule *nisi* to 27 September 2023 for proper compliance. The ambiguity lay in that a proper service affidavit was to be compiled given the various services as per paragraph [9] of the order *supra*. What followed was an appearance by Advocate Moloto on behalf of the employees.

[6] The following are the submissions in the main of the various legal representatives for Mrs. D[redacted], Mr. D[redacted], and Advocate Moloto employees.

Submissions by Advocate Fourie SC for Mrs. D[redacted]

[7] Advocate Fourie SC submitted that as demonstrated by the pleadings in the divorce action and the present applications the D[redacted]'s are anything but cordial. There is a clear lack of co-operation between them. It therefore can be concluded that their relationship has irretrievably broken down. This has led to the heightened acrimony that exists. Given the break down in trust the D[redacted]'s are not capable of working together. Therefore, they are deadlocked. To accentuate this principle Advocate Fourie SC, place much store on *Kanakia v Ritzshelf 1004 CC t/a Passage to India and Another* 2003 (2) SA 39 (D).

[8] It was further contended that the deadlock that existed between the D[redacted]s' was fortified by Mr. D[redacted]'s counter application which was subsumed within the provisions of section 36 (1)(d) and 36(2) of the CCA. This application self-evidently illustrated and justified the ineluctable inference that a deadlock existed between the D[redacted]s' and under those circumstances, it would be just and equitable for the close corporations to be liquidated.

[9] The existence of a deadlock between the D[redacted]s' was further exploited to good effect by Advocate Fourie SC in having asserted the following:

(i) Mrs D[redacted] pleads that there exists no prospect of her and Mr D[redacted] conducting any business together nor owning any property.

(ii) Mr and Mrs D[redacted] were involved in an acrimonious divorce action.

(iii) Mr D[redacted] sought and initially obtained a Protection Order in terms of section 4(1) of the Domestic Violence Act 116 of 1998.

[10] Turning to the three defences to the liquidation orders, Advocate Fourie SC contended that two are common to both applications. These defences are respectively the defence of *lis alibi pendens* and the counter application as ensconced in section 36(1)(d) and 36(2) of the CCA.

[11] In addressing the defence of *lis alibi pendens* Advocate Fourie SC contended that the very fact that Mr. D[redacted] seeks an amendment of the pleadings exchanged in the action proceedings between the respective parties was positive proof of the fact that the issues in the action proceedings at the time of the prosecution of the respective liquidation applications were not the same. Moreover, Mr. D[redacted] has pursuant to Mrs. D[redacted]'s filing of an objection to such amendment failed to take the necessary procedural steps to effect the proposed amendment. Advocate Fourie SC, contended, that amendment cannot be granted as it fundamentally sought to make applicable the law of partnership to separate, distinguishable and registered close corporations which are independent legal personae.

[12] Additionally, Advocate Fourie SC asserted that it was simply to fit the mold of a partnership as an overarching institution, over the existence and functioning of the corporate structures. See: *Tjosponie Boerdery (Pty) Ltd v Drakensberg Botteliers* 1989(4) SA 31 (T) at 45.

[13] Insofar as the second defence of l*ocus standi* of Mr. and Mrs. Van Wyk, Mr. D[redacted] takes issue therewith. Notably, Mr. D[redacted] does not join issue with the *locus standi* of Mrs. D[redacted] to prosecute either of the applications. Taking this point of *locus standi* to its logical conclusion

Advocate Fourie SC, claimed that even if the Court was not with Mrs. D[redacted] on the *locus standi* of Mr. and Mrs. Van Wyk, Mrs. D[redacted] was still clothed with the requisite *locus standi* to have persisted with these applications.

[14] Finally, Advocate Fourie SC, avowed that in the financial statements that Mr. D[redacted] caused to be drafted, to ascertain the value of the members interest in J[redacted] E[redacted] CC, the indebtedness to the Van Wyk's is evident from note 10 to the financial statements which is dispositive of all allegations of the non-existence of the loan.

[15] Advocate Fourie SC asseverated that in so far as it related to the conditional application, the law is trite. In terms of section 36 of the CCA, a court is entitled to intervene in the affairs of a close corporation within a specificity of circumstances. A corporation is essentially a partnership between the members which is as such (and unlike a partnership at common law) a separate legal *persona*. The legislature's recognition of this fact is the reason for the enactment of these provisions. The purpose is to empower the court to dissolve the association between the members without winding-up the corporation, on the ground that it would be just and equitable, in circumstances which, in the context of a partnership would warrant its dissolution. See: *De Franca v Exhaust Pro CC(De Franca Intervening)* 1997 (3) SA 878 (SECLD) at 896.

[16] Within the four corners of an application in terms of section 36(1) (d) of the CCA, Advocate Fourie SC contended that this Court was to determine objectively whether the impracticability exists to proceed

with the relationship. It was submitted that this Court must be satisfied that the conduct complained of by Mr. D[redacted] was of such a nature that the reasonable man in the position of Mr. D[redacted] could not be expected to carry on business of the corporations with Mrs. D[redacted]. To this end, the onus of proving that the relief claimed is that of Mr. D[redacted], so the contention ran. Once a court has decided that an order for such a cessation of membership be made it is empowered with a discretion to make further orders referred to in subsection 36(2) of the CCA.

Submissions Advocate Pistor SC for Mr D[redacted]

[17] Advocate Pistor SC contended that there were three grounds upon which Mr. D[redacted] relied on, to show cause why the provisional order should not have been made final. An examination of any of these grounds, separately or collectively should result in the discharge of the rule *nisi* so the contention ran. I shift focus to delineate each of these grounds.

The deadlock between Mr. and Mrs. D[redacted] had been compromised

[18] Advocate Pistor SC averred that in our law a compromise or *transactio* is an agreement between two or more persons, who for preventing or ending a lawsuit, adjust their differences by mutual consent. This occurs in a manner which they agree on and which everyone of them prefers. See: *Erasmus v Church* 1927 TPD 20. This transactio, has the effect of barring the right to proceed on the original cause of action. See: *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA) at paragraph [12].

[19] To this end, Mrs. D made an offer pertaining to the division of the assets of the parties, including the assets of the G V L D CC. Mr. D accepted the offer. It axiomatically follows so Advocate Pistor SC claimed, that a compromise as to the division of the assets and liabilities of Mr. and Mrs. D had been reached.

[20] Advocate Pistor SC conceded that there is yet to be *consensus* in the true sense in respect of monetary compensation regarding the assets and liabilities. However, the law provided that a preliminary contract with other material aspects still to be agreed upon, nonetheless constituted a binding contract. See: *CGEE Alstom Equipments et Enterprises Electriques, SA Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92 B-F.

[21] On an application of the principles enunciated in *CGEE,* Advocate Pistor SC asserted that the deadlock between the members of the G V L D CC has fallen away. As a result, the provisional order stood to be discharged.

An alternative remedy in terms of section 36 of the CCA

[22] Advocate Pistor SC maintained that within the provisions of section 347(2) of the old Companies Act, 61 of 1973 where an application for winding-up was presented by a member, such as Mrs. D and it appeared to the Court that the applicant was entitled to the relief, the Court shall make a winding-up order. This would apply, unless the Court is satisfied that some other remedy is available to the applicant and that the applicant was acting unreasonably in seeking to have the company (or close corporation) wound up instead of

pursuing that alternative remedy. See: *Moosa NO v Mavjee Bhawan (Pty) Ltd* 1967 (3) SA 131 (T) 150H-152E).

[23] Advocate Pistor SC expounded that not only does the compromise, demonstrate the existence of an alternative remedy which was availed to Mrs. D[redacted], even if the Court found it not to be so. Put differently, Mrs. D[redacted] had made a with "prejudice offer", under oath for the purchase of Mr. D[redacted]'s members interest in G[redacted] V[redacted] L[redacted] D[redacted] CC.

The matter is *lis alibi pendens*

[24] It was posited by Advocate Pistor SC that the question as to how the members' interest of G[redacted] V[redacted] L[redacted] D[redacted] CC was to be dealt, remained a pending subject matter between Mr. and Mrs. D[redacted].

Submissions by Advocate Moloto on behalf of the employees J[redacted] E[redacted]

[25] Advocate Moloto for the employees had not made any submissions of a material nature.

The law

[26] It is trite that a deadlock is a ground for liquidation on the basis that it is just and equitable for the entity to be wound-up. In Henochsberg on the Companies Act 61 of 1973 in the commentary to s 344(h), the following is mentioned:

'Unlike the other paragraphs of the section, this paragraph "postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up" . . .. The Court's reaching of the conclusion that winding-up would be just and equitable involves the exercise, not of a discretion, but of judgment on the facts found by the Court to be relevant; once, however, such conclusion is reached, the making of the order for the winding-up does involve the exercise of a discretion . . .'

[27] Additionally, the following is stated regarding the concept of deadlock as constituting a ground for liquidation envisaged in s 344(h) of the 1973 Companies Act:

'In the case of a "domestic" company, ie a company with a small membership (it could be a public company but would usually be a private one), winding-up is just and equitable where the "deadlock" principle, derived from In re Yenidje Tobacco Co Ltd [1916] 2 Ch 426 (CA), can be applied; this is "founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. Usually that relationship is such that it requires the members to act reasonably and honestly towards one another and with friendly cooperation in running the company's affairs. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up, in the same way as, if they were partners, they could claim dissolution of the partnership" . . . The destruction of the relationship may result in literal deadlock, ie where the factions hold equal voting power in general meeting, in which event winding-up must ordinarily inevitably ensue . . . but it is not necessary to establish literal deadlock: it suffices to show that as a result of the particular conduct, there is no longer a reasonable possibility of running the company (through the majority vote) consistently with the basic arrangement between the members . . . (eg constant quarrelling between the

only two shareholders with voting rights as such, who are also the only two directors, leading to a situation where they are not on speaking terms. . .).'

[28] Further on in Henochsberg, at page 705 what is referred to as the factual basis for a deadlock, the authors refer to a situation:

". . . where a company was formed for a specific purpose, but internal disputes, mutual disillusionment and distrust and the consequent breakdown of the relationship between the shareholders have paralysed the company."

[29] In *Thunder Cats Investments 92 (Pty) Ltd and Another v Nkonjane Economic Prospecting & Investment (Pty) Ltd and Others* 2014 (5) SA 1 (SCA), also concerned the application for the winding-up of a solvent company in terms of s 81 of the 2008 Companies Act, on the grounds that the directors and/or shareholders were in a deadlock, and as an alternate ground for the winding-up, that it was just and equitable to do so. An examination what was required for a deadlock fell for consideration. The SCA considered the words 'just and equitable' as they appear in the 1973 Companies Act as well as the 2008 Companies Act. The SCA was confronted with whether a wide or narrow definition ought to apply to the meaning of 'just and equitable' as envisaged in s 81(1)(d)(i), (ii) and (iii). In respect of the latter SCA held the following:

'The examples of "deadlock" given in s 81(1)(d)(i) and (ii), that is, where either the board or the shareholders are deadlocked are examples only, and, it seems to me, are not exhaustive and do not limit s 81(1)(d)(iii). The use of the word "otherwise" in the subsection does not limit what is meant by "just and equitable".

[30] The SCA postulated as follows when dealing with the legal term "just and equitable":

'Section 344(h) of the 1973 Act provides that a company may be wound up by the court when it is 'just and equitable' to do so. A winding-up on this basis 'postulates not facts but only a broad conclusion of law, justice and equity, as a ground for winding-up'. The subsection is not confined to cases which were analogous to the grounds mentioned in other parts of the section. Nor can any general rule be laid down as to the nature of the circumstances that had to be considered to ascertain whether a case came within the phrase. There is no fixed category of circumstances which may provide a basis for a winding-up on the just and equitable ground. In Sweet v Finbain it was said: "The ground is to be widely construed; it confers a wide judicial discretion, and it is not to be interpreted so as to exclude matters which are not ejusdem generis with the other grounds specified in s 344. The fact that the Courts have evolved certain principles as guides in particular cases, or examples of situations where the discretion to grant a winding-up order will be exercised, does not require or entitle the Court to cut down the generality of the words "just and equitable"." Section 344(h) gave the court a wide discretion in the exercise of which certain other sections of the Act had to be taken into account.' (Footnotes omitted.)

[31] The SCA vocalized the following with respect to the word deadlock: "the word"deadlock" is not always given the same meaning. The reference to deadlock in the previous paragraph and also in s 81(1)(d)(i) and (ii) was described as a case of "complete deadlock", but there is no particular advantage in the introduction of this term. The "deadlock principle", on the other hand, is — "founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business". The "superimposition of equitable considerations" in such a case may justify the dissolution of such a company under the just and equitable provision.'

(Footnotes omitted). See: *Kanakia v Ritzshelf 1004 CC t/a Passage to India Another* 2003 (2) SA 39 (D) at 45A, *Moosa, NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T), *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W).

[32] In *Apco Africa (Pty) Ltd and Another v Apco Worldwide Inc* [2008] ZASCA 64; 2008 (5) SA 615 (SCA) the Supreme Court of Appeal had cause to consider s 344(h) of the 1973 Companies Act, and what was meant by just and equitable within the meaning of that section. Ponnan JA expressed this as follows:

'There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in Loch v John Blackwood Ltd [1924] AC 783 (PC) at 788, is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director's conduct of those affairs. The second, usually called the deadlock principle, is derived from the Yenidje Tobacco Company case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up.'

[33] Ponnan JA reiterated the following:

> 'Actual deadlock is not an essential to the dissolution of a partnership. All that is necessary is to satisfy a court that it is impossible for the partners to place that confidence in each other which each has a right to expect and that such impossibility has not been caused by the person seeking to take advantage of it.'

[34] In my view I was not convinced that it would be just and equitable to order the final liquidation. In respect of the counter application, it became academic and did not require further attention.

Order

[35] In the premises, I reiterate the order that was handed down on 01 December 2023:

Case M255/21

The application for the liquidation of the Close Corporation 'G[redacted] V[redacted] L[redacted] D[redacted] CC' is dismissed with costs.

Case M256/21

The application for the liquidation of the Close Corporation 'J[redacted] E[redacted] CC' is dismissed with costs.

No order is made on the conditional counterclaim filed by Mr. D[redacted] in terms of section 36 of the Close Corporation Act, 69 of 1984.

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Applicant:	Advocate H Fourie SC
Attorneys for Applicant	Bosman & Bosman Attorneys C/O Labuschagne Attorneys 19 Constantia Drive Riviera Park Mahikeng
For the Respondent:	Advocate J H F Pistor SC
Attorneys for Respondent:	Strydom& Bredekamp Attorneys C/O: Smit Stanton Inc 92 Warren Street Mahikeng
For the Intervening Parties :	Advocate Moloto *Pro Bono* Counsel North West Bar Association
Date of request for reasons:	31 January 2024
Date request for reasons received:	01 February 2024.
Date reasons requested handed down	19 June 2024